U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: NOV 09 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director. The director denied the petition and certified his decision to the AAO. The AAO will sustain the appeal and approve the petition.

The petitioner is a property development firm. It seeks to employ the beneficiary permanently in the United States as an operations research manager (property development) pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act).[1] As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director initially determined that the petitioner had not established that the beneficiary possessed the educational credentials required by the terms of the labor certification and denied the petition.

On appeal, the AAO withdrew the director's decision with regard to the beneficiary's educational credentials but remanded the case to the director to determine the petitioner's ability to pay the proffered wage and to determine whether the beneficiary acquired the requisite five years of progressive experience required by the certified labor certification by the priority date in order to be qualified as an advanced degree professional.

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[1]Section 203(b) of the Immigration and Nationality Act (the Act) states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--
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> (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On remand and in response to the notice of certification issued by the director, counsel also submitted additional evidence and a brief. Counsel contends that the petitioner established that it has had the continuing ability to pay the proffered wage. Counsel also asserts that the beneficiary's work experience satisfied the terms of the ETA Form 9089 and that the petition should be approved.

The director determined that the petitioner did not demonstrate that the beneficiary had the five years of full-time experience required by the labor certification and also that the petitioner failed to establish that it had the continuing ability to pay the proffered wage based on the evidence submitted. The director certified his decision to the AAO.[2] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date which is the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also establish that the petitioner has had the continuing financial ability to pay the proffered wage as of the priority date.[4] Here, the ETA Form 9089 was accepted for processing

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[2] The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision."

[4] The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

on November 10, 2008, which establishes the priority date. The Immigrant Petition for Alien Worker (Form I-140) was filed on July 27, 2009. The proffered wage as stated on Part G of the ETA Form 9089 is $52,000 per year. The ETA Form 9089 does not indicate that the beneficiary worked for the petitioner.

Part 5 of the I-140, Immigrant Petition for Alien Worker, reflects that the petitioner[5] was established in 2006 and currently employs four workers.

Based on a review of the totality of circumstances in the record, the petitioner demonstrated its continuing financial ability to pay the proffered wage from the priority date onward.

The petitioner seeks visa classification of the beneficiary as a second preference advanced degree professional. The petitioner asserts that the beneficiary has a foreign equivalent degree

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The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage and demonstrate that the beneficiary is qualified for the job offered are essential elements in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic relevant to the continuing ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

[5] As noted in the AAO's prior decision of March 8, 2012, the petitioner is structured as a limited liability company (LLC). This is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. In this case, the tax returns indicate that the petitioner was a single-member LLC in 2008, 2009 and 2010. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner became a multi-member LLC in 2011 and would be considered to be a partnership for federal tax purposes. For a single-member LLC, USCIS considers line 31 of the Form 1040's Schedule C, Net Profit or (loss) to represent net income. For the two-member LLC as indicated on the Form 1065 filed by the petitioning business in 2011, net income is found on line 1 of page 5 of Schedule K.

followed by at least five years of progressive experience. As noted above, it has been established that the beneficiary possesses the U.S. equivalent of a Bachelor's degree.[6] Part H of the ETA Form 9089 also requires 60 months (five years) of experience in the position offered as an operations research manager (property development). Part H.10 states that experience in an alternate occupation is not acceptable.

Based on a review of the underlying record, the petitioner has established that the beneficiary has the requisite experience as set forth on the ETA Form 9089 by evidence that complies with the requirements of 8 C.F.R. § 204.5(k)(3)(i)(B). The AAO further accepts counsel's and Global Assets Realty's explanation as to the beneficiary's affiliation with other registered companies as a point of contact and does not necessarily find that this negates the petitioner's extension of a *bona fide* job offer.

Based on the foregoing, the petition will be approved as a member of the professions holding an advanced degree pursuant to Section 203(b) of the Act.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition is approved.

[6] Part H of the ETA Form 9089 permits a degree with any major. The beneficiary has the foreign equivalent of a U.S. bachelor's degree in law and economics.